

Rashad Demetrius Babbs
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FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

WASHINGTON STATE COURT OF APPEALS

DIVISION II

STATE OF WASHINGTON

vs.

RASHAD BABBS

Defendant

Case No.: 55776-2-II

NO. 01-1-02239-5

STATEMENT OF ADDITIONAL
GROUNDS

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I. INTRODUCTION

On May 7, 2021, Mr. Rashad Babbs (hereafter “Mr. Babbs”) was re-sentenced for the 2003 (first trial) and 2004 (second trial) convictions that arose from a single incident in 2001.

In 2003, Mr. Babbs and his co-defendant were convicted of felony murder as a result of the first jury trial. The jury could not reach a verdict for the second count—attempted murder in the first degree. In 2004, Mr. Babbs and his co-defendant went through a second jury trial for the attempted murder with an added “premeditation” element and were ultimately convicted.

Mr. Babbs’ conviction and sentence were vacated by an order of the Pierce County Superior Court and the case was set for a new resentencing.

The State presented Mr. Babbs’ criminal history incorrectly during the resentencing. This inaccurate presentation was heavily relied upon by the sentencing Judge resulting in a higher sentence and miscalculation of Mr. Babbs’ offender score.

The Court also erred in using Mr. Babbs’ criminal history to conclude that Mr. Babbs’ brain was developed, and he knew right from wrong when he committed the crime as a young adult.

Mr. Babbs is currently in the custody of Department of Correction, at Stafford Creek Corrections Center in Aberdeen, Washington.

Summarized in this brief are the additional grounds for review filed *pro se* to supplemental the opening brief filed by Mr. Babbs’ counsel.

II. PROCEDURAL HISTORY

Mr. Babbs was sentenced to a total of 734 months in prison (374 months for the murder conviction, 240 months for the attempted murder, and 120 months for gun enhancements—5 years for each conviction).

Mr. Babbs appealed the decision, and the judgment was affirmed until Mr. Babbs through, current counsel, filed a motion to vacate the order and judgment and set for resentencing based on the Court holding in *State v. Weatherwax*. 188 Wash. 2d 139, 143-44, 392 P.3d 1054 (2017). The State did not oppose the motion to vacate the judgment. The Court set the case for a resentencing.

On November 30, 2018, the unopposed motion resulted in an order by the Superior Court vacating the judgment and setting it for a resentence hearing.

On May 7, 2021, Mr. Babbs was resentenced to 47 years in prison, which was 15 years shorter than the original sentence of 61 years.

Mr. Babbs, through counsel, timely appealed the decision.

III. ANALYSIS

A. First Ground – Prosecutorial Misconduct (Misrepresentation of Criminal History that Prejudiced Mr. Babbs Resulting in a Higher Sentence and Miscalculation of His Offender Score.

During the May 7, 2021, resentencing hearing, Mr. Babbs' criminal history was presented improperly, which in turn resulted in the miscalculation of Mr. Babbs' offender score and a longer sentence imposed.

In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the record and all of the circumstances of the trial. *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020).

Prosecutors are permitted to argue reasonable inferences from the evidence in a closing statement, but such arguments must be based on probative evidence and sound reason.

Loughbom, 196 Wn. 2d at 76-77.

To establish prejudice as a result of prosecutorial misconduct, the defendant must show a substantial likelihood that the misconduct affected the jury verdict. *State v. Thorgerson*, 172 Wn. 2d 438, 442-43, 258 P.3d 43 (2011). When a defendant fails to object, he has waived any error unless the prosecutor's misconduct was so "flagrant and ill intended that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn. 2d 741, 760-61, 278 P.3d 653 (2012). To prevail under this standard, the defendant must show 1) no curative instruction could have eliminated the prejudicial effect, and 2) there was a substantial likelihood the misconduct resulted in prejudice that affected the verdict. *Id.* at 761.

Here, the prosecutorial misconduct was not before the jury and thus could not have been cured by a subsequent correction on jury instructions. However, the prosecutor's misstatement of material facts—Mr. Babbs' criminal history—had a prejudicial impact in the Judge's decision that relied heavily on the improper information by the State, resulting in the imposition of a higher sentence.

(a) Presentation of Convictions not in Mr. Babbs' Criminal History:

During the closing statement, the State informed the Court that Mr. Babbs had many assaults and violent felony convictions. The State presented what he purported was Mr. Babbs' criminal history, which included several convictions that Mr. Babbs was not convicted of or even arrested for including three felony assault convictions.

He [Mr. Babbs] was convicted in 1991 for assault. '92 for attempted theft of a motor vehicle. '92 for attempted theft of a motor vehicle. '92 for attempted theft of a motor vehicle. '93 assault. '93 possession of stolen property, attempting to elude a pursuing

police vehicle. '93, theft for a motor vehicle. '93 theft for motor vehicle. '95 assault. There's some petty driving offenses. '95 criminal trespass. '96, theft in the first degree. '95 attempting to elude a pursuing police vehicle and criminal trespass. And '97, as an adult, failure to remain at an injury accident. And then in 2000, as an adult, felony possession of a firearm. Those two adult cases he did go to prison for.

Tr. 50 of Resentencing Transcript. The State further detailed:

I don't bring up that criminal history for any purposes other than to say that Mr. Babbs knew from his history what was wrong and what was right, and he had to know based on those experiences. That what he was doing that night was absolutely wrong.

Which leaves - - leads - - leaves a simple question: did he have the ability to conform his conduct to the requirements of the law?

Tr. 50 and 51 of Resentencing Transcript.

The prosecutor's misstatement of Mr. Babbs' criminal history was prejudicial to Mr. Babbs as the Court clearly relied on the misrepresented criminal history. The Court held:

This was not your first criminal offense Mr. Babbs. As we've gone through your criminal history, it was not your first felony. Mr. Babbs you actually had nine felonies, I believe, ten misdemeanors and 16 criminal cases, many from threats and *assaultive conduct*.

Tr. 57, emphasis added.

Mr. Babbs' criminal history reflects that he has no assaultive conduct or convictions. As the record established, the Judge relied heavily on the presentation of the prosecutor in imposing a higher sentence. Although the Court concluded that the sentence imposed was the minimum sentence for the convictions, the Judge at its discretion could have ruled that the sentences run concurrently, which would have resulted in a sentence almost 20 years less. See Exhibit A attached.

(b) State Improperly Presented Juvenile Convictions that should have been legally excluded under the Sentencing Reform Act and not included in the offender score.

The prosecution presented juvenile convictions that although were in Mr. Babbs' criminal history, they should have been legally excluded under the 1981 Sentencing Reform Act.

According to *State v. Smith*, the Washington Supreme Court held that the 1997 amendment to the provisions of the Sentencing Reform Act of 1981 (SRA) could not be applied retroactively. 144 Wn. 2d 665, 674-75 30 P.3d 1245 (2001). It was an error for the sentencing court to revise previously washed-out juvenile adjudications and calculate them into the offender score.

The law in effect when Mr. Babbs turned 15 years old (June 27, 1994) was the pre-1997 amendment to the SRA. Based upon the court's judicial construction of the 1997 amendment, all of Mr. Babbs' juvenile offenses committed prior to June 27, 1994, had washed out for sentencing purposes. Therefore, it was an error for the sentencing Court to revive previously washed-out juvenile convictions and calculate them into the offender score applying *State v. Smith*. 144 Wn. 2d 665, 674-75 30 P.3d 1245 (2001). The Court asserted that a conviction washes out permanently on the occasion of the defendant's fifteenth or twenty-third birthday, according to the law in effect on that birthday.

Reviewing Mr. Babbs' Judgment and Sentence, 1 through 5 are washed out, 6 and 7 are juvenile offenses that count as one-half (1/2) point each, totaling 1 point combined; 8 and 9 are adult felonies, 1 point each, totaling 2 points. This calculation leads Mr. Babbs with an offender score of 3 points total. The Judgment and Sentence reflect a score of 4.

Mr. Babbs' first five convictions were prior to Mr. Babbs' turning fifteen (15) years old and neither of his convictions were violent in nature. In fact, all of Mr. Babbs' convictions prior to 2004 are non-violent theft-related and driving-related in nature.

The State misrepresented Mr. Babbs' criminal history and the Court as stated in the transcript relied on the "assaultive conduct" and the numerous felonies presented by the State to sentence Mr. Babbs to a 47-year sentence, which in effect is a pseudo-life sentence that relied heavily on retention as opposed to rehabilitation. Mr. Babbs' counsel explained in detail the other factors and errors that led to the longer sentence imposed in the appeal brief. See Exhibit B.

Mr. Babbs' offender score was miscalculated due to the scoring of prior juvenile convictions that had washed out under the relevant statutes. According to the proceeding, his judgement and sentencing is invalid on its face.

IV. CONCLUSION

For the above reasons, Mr. Babbs also respectfully requests a remand with instructions for the Court to consider Mr. Babbs' criminal history anew since the State presented convictions that were both not included in Mr. Babbs' criminal history and/or not allowed to be revived under the Sentencing Reform Act of 1981. Mr. Babbs also respectfully requests that the Court consider the scientific development of Mr. Babbs' brain as Counsel indicated in providing a proper sentencing as opposed to the State's suggestion that a criminal history should indicate Mr. Babbs was aware of understanding right from wrong.

Mr. Babbs respectfully requests that the Court remands the case for proper calculation of his points.

Lastly, if the Court requires additional detail analysis of the issues, Mr. Babbs respectfully requests that additional briefing be provided to counsel and/or Mr. Babbs.

Respectfully submitted by,



Rashad Demetrius Babbs DOC #783496
C/O Stafford Creek Correctional Center

CERTIFICATE OF SERVICE

I, RASHAD DEMETRIUS BABBS, certify that on Oct 14, 2022, I served a copy of this Statement of Additional Grounds and Attached Supporting Documentation on the following individuals:

Mr. Jeffrey Ellis WSBA 17139, Counsel for Rashad Babbs, at:

Law Office of Alsept & Ellis

621 SW Morrison St. Ste 1025

Portland, OR 97205

By DOC Legal Mail.

10-14-2022

Date

Rashad Bull

Signature

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BY _____
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EXHIBIT A

1 but it requires the defense to show that Mr. Babbs'
2 capacity to appreciate the wrongfulness of his conduct
3 or to conform his conduct to the requirements of the
4 law was significantly impaired; and, to that end, I
5 have to bring up his criminal history.

6 Did he understand it was wrong to rob people? Did
7 he understand it was wrong to have a gun? Did he
8 understand it was wrong to shoot people? We do have to
9 look at his criminal history that predated this event,
10 and it is significant.

11 ~~He was convicted in 1991 for assault.~~ '92 for
12 attempted theft of a motor vehicle. '92 for attempted
13 theft from motor vehicle. '92 attempted theft of motor
14 vehicle. '93 ~~assault.~~ '93 possession of stolen
15 property, attempting to elude a pursuing police
16 vehicle. '93, theft from a motor vehicle. '93, theft
17 from a motor vehicle. ~~1995, assault.~~ There's some
18 petty driving offenses. '95, criminal trespass. '96,
19 theft in the first degree. '95 for attempting to elude
20 a pursuing police vehicle and criminal trespass. And
21 '97, as an adult, failure to remain at an injury
22 accident. And then in 2000, as an adult, felony
23 possession of a firearm. Those two adult cases he did
24 go to prison for.

25 I don't bring up that criminal history for any

1 purpose other than to say that Mr. Babbs knew from his
2 history what was wrong and what was right, and he had
3 to know based on those experiences that what he was
4 doing that night was absolutely wrong.

5 Which leaves -- leads -- leaves a simple question:
6 Did he have the ability to conform his conduct to the
7 requirements of the law? Was his ability to conform
8 his conduct to the requirements of the law
9 significantly impaired? That is, I think, really the
10 sole focus from the State's perspective.

11 And to that I say, he was merely 22 years old. I
12 don't mean to demean or belittle at all his -- his --
13 the upbringing he had. I don't question that it was
14 terrible and that he deserved a lot better. I mean
15 that. But we see a lot of people who go through the
16 same upbringing; and, despite that upbringing, he did
17 have the ability to stop himself. He did have the
18 ability to not carry around a gun. He did have the
19 ability and was able to control himself and not to rob
20 people. And he did have the ability not to shoot at
21 people who he was trying to rob.

22 He was nearly 22 years old. It was not some 16
23 year old or 17 year old or 18 year old who doesn't know
24 better and just can't think and function with their own
25 sense of autonomy. This was someone who, despite

1 know his behavior was wrong or he was significantly
2 impaired in controlling his behavior.

3 Again, the Court has reviewed everything, and the
4 Court is finding no support for those conclusions and
5 is denying your request for an exceptional sentence.

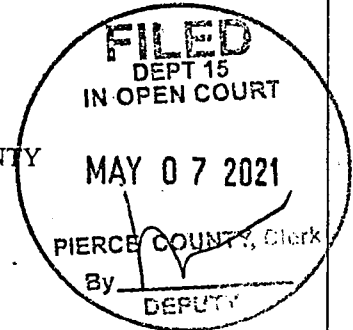
6 The Court's not saying that there aren't
7 mitigating circumstances for your sentence. You do
8 claim a low IQ, yet you were able to complete Job Corp.
9 with a trade. And you had a job after Job Corp., and
10 you -- you had jobs. You were ready at about 18 years
11 old to have a career as a masonry. And I so wish that
12 you had continued in that, sir.

13 This was not your first criminal offense, as we've
14 gone through your criminal history, and it was not your
15 first felony. You actually had nine felonies and, I
16 believe, ten misdemeanors in 16 criminal cases, many
17 from threats and assaultive conduct. And you knew well
18 by 21 years and approximately nine months the
19 consequences of stealing and the consequences of acting
20 out violently.

21 So the Court has reviewed the file and all the
22 pleadings and the materials submitted by the parties,
23 including the declaration by Mr. Hicks. And that was
24 dated on 12/17/2019, and that was a declaration that
25 was filed after his September 18, 2019, resentencing.

EXHIBIT B

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 01-1-02239-5

vs.

RASHAD DEMETRIUS BABBS

Defendant.

SID: WA15846957

DOB: 06/27/1979

PCN: 537274271

JUDGMENT AND SENTENCE (FJS)

- ☒ Prison
☐ RCW 9.94A.712/9.94A.507 Prison Confinement
☐ Jail One Year or Less
☐ First-Time Offender
☐ Sex Offense
☐ Special Sexual Offender Sentencing Alternative
☐ Special Drug Offender Sentencing Alternative
☐ Parenting Alternative
☐ Alternative to Confinement (ATC)
☐ Persistent Offender
☐ Defendant Used Motor Vehicle
☐ Defendant Took a Motor Vehicle
☐ Juvenile Decline ☐ Mandatory ☐ Discretionary
☐ Clerk's Action Required, para 2.1, 4.1, 4.3, 4.8, 5.2, 5.3, 5.5, 5.7 and 5.8

I. HEARING

- 1.1 The Court conducted a sentencing hearing this date; the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

- 2.1 **CURRENT OFFENSE(S):** The defendant plead guilty to count IV, UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE on April 21, 2003; the defendant was found guilty of count I, MURDER IN THE FIRST DEGREE on May 14, 2003; and the defendant was found guilty of count II, ATTEMPTED MURDER IN THE FIRST DEGREE on February 18, 2004. based upon ☒ guilty plea ☒ jury-verdict ☐ bench trial of:

COUNT	CRIME	CLASS	RCW (with Subsections)	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	MURDER IN THE FIRST DEGREE (D1)	A	9A.32.030(1)(c)(1) 9A.08.020	FASE	03/22/01	TPD 01-081-1333
II	ATTEMPTED MURDER IN THE FIRST DEGREE (D1-A)	A	9.94A.370 9.94A.530 9A.280.020	FASE	03/22/01	TPD 01-081-1333
IV	UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE (GGG70)	C	9.41.040(1)(b)	N/A	03/22/01	TPD 01-081-1333

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

*Enhancement: (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude, (ALF) Assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16. (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8).

(If the crime is a drug offense, include the type of drug in the second column.)

as charged in the CORRECTED AMENDED Information

☒ A special verdict/finding for use of firearm was returned on Count(s) I, II RCW 9.94A.602, 9.94A.533.

☐ Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

2.1b ☐ Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): N/A

*DV: Domestic Violence was pled and proved.

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	A OR J ADULT OR JUV	TYPE OF CRIME	DV* YES
1	PSP 2	01/14/93	PIERCE, WA	11/29/92	J	NV	
2	ATT ELUDE	01/14/93	PIERCE, WA	11/29/92	J	NV	
3	THEFT 2	08/23/93	PIERCE, WA	06/29/93	J	NV	
4	TMVWOP	08/23/93	PIERCE, WA	07/20/93	J	NV	
5	TMVWOP	08/23/93	PIERCE, WA	07/20/93	J	NV	
6	THEFT 1	03/07/96	PIERCE, WA	04/29/95	J	NV	
7	ATT ELUDE	03/07/96	PIERCE, WA	01/17/96	J	NV	
8	FTRASOA	06/15/98	PIERCE, WA	09/27/97	A	NV	
9	UPOF 2	05/11/00	PIERCE, WA	03/10/00	A	NV	

*DV: Domestic Violence was pled and proved.

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are listed in the Stipulation on Prior Record and Offender Score filed herein.

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	XV	240 TO 320 MONTHS	60 MONTHS - FASE	300 TO 380 MONTHS	LIFE/\$50,000
II	4	XV	210.75 TO 280.5 MONTHS	60 MONTHS - FASE	270.75 TO 340.5 MONTHS	LIFE/\$50,000
IV	5	III	17 TO 22 MONTHS	N/A	17 TO 22 MONTHS	5YRS/\$10,000

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are ☐ attached ☐ as follows: _____

2.4 ☐ **EXCEPTIONAL SENTENCE.** The court finds substantial and compelling reasons that justify an exceptional sentence:

☐ within ☐ below the standard range for Count(s) _____.

☐ above the standard range for Count(s) _____.

☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury by special interrogatory.

☐ within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court makes the following specific findings:

☐ _____ The defendant is indigent as defined in RCW 10.1010010(3)(a)-(c) because the defendant:

☐ receives public assistance ☐ is involuntarily committed to a public mental health facility ☐ receives an annual income, after taxes, of 125 percent or less of the current federal poverty level.

☐ The defendant is not indigent as defined in RCW 10.101.010(3)(a)-(c).

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): _____

☐ _____ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

☐ (Name of Agency) _____'s costs for its emergency response are reasonable. RCW 38.52.430 (effective August 1, 2012).

2.6 ☐ **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9.41.010.

☐ The court considered the following factors:

☐ the defendant's criminal history.

☐ whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

EX-B